Supreme Court, U.S.
FILED
JUL 9 2001
CLERK

RECORD NO.00-1937 (2)

IN THE
Supreme Court of The United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

CLEVELAND B. WALTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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39 pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether a claimant is entitled to disability benefits if he has a severe physical or mental impairment which has lasted or is expected to last at least 12 months, but he engages in substantial gainful activity within 12 months of his onset date.

2. Whether a claimant under Title II is entitled to a trial work period if he has a severe impairment which has lasted or is expected to last more than 12 months, even though he returns to substantial gainful activity after the five month waiting period but within 12 months of his onset date.

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STATEMENT OF THE CASE

Cleveland Walton, a college graduate and teacher, was denied disability benefits, despite his continuing Listing-level psychiatric impairment, for the sole reason that he returned to work (as a grocery store clerk) despite his continuing impairment, within 12 months of his October 1994 onset date. Walton's return to work occurred after his application for benefits and after the five month waiting period, but before his disability was adjudicated and before 12 months had elapsed from the date he first became disabled.

Walton was hospitalized with major depression, recurrent with psychotic features, in October 1990 and again in May 1994. Appendix to Petition ("App.") 55a. After losing his job as a teacher in October 1994, Walton attempted a series of jobs, but he was fired from each after a brief work period, such that the Administrative Law Judge ("ALJ") deemed them to be unsuccessful work attempts. App. 53a. Walton was hospitalized a third time in March 1995 and was diagnosed at this time as suffering with paranoid schizophrenia. App. 56a. At the time of both administrative hearings in July 1996 and June 1997, the ALJ concluded that Walton had a Listing-level psychiatric impairment. App. 59a, 45a. However, because Walton had attempted to work as a grocery store clerk, beginning with part-time work in May 1995, and because he earned more than the

substantial gainful activity ("SGA") level of $500 in October 1995, the ALJ, after a second administrative hearing, concluded that Walton was not under a disability and consequently was not entitled to a period of disability, cash benefits, or a trial work period since he had not been prevented from engaging in SGA for a continuous period of at least 12 months. App. 44a, 45a.

The Appeals Council and the District Court subsequently upheld the ALJ's conclusions. App. 36a-38a; App. 15a-26a. On appeal, the Fourth Circuit Court of Appeals affirmed the district court's holding that Walton had returned to SGA in October 1995, when his earnings exceeded $500, but reversed the district court's holding that Walton was not under a disability when he engaged in SGA prior to the lapse of 12 months from his onset date and prior to adjudication of his claim and reversed the lower court's holding that Walton was not entitled to a trial work period. Walton v. Apfel, 235 F.3d 184 (4th Cir. 2000), App. 2a, 7a.

REASONS FOR DENYING THE PETITION

This Court should deny the Commissioner's Petition for a Writ of Certiorari. The Petition buries in a footnote on the last full page of the Petition the fact that the Fourth Circuit's opinion in this case is in accordance with the rulings of four other Courts of Appeals in holding that a trial work period is available if the claimant has an impairment which has lasted, or is expected to last, at least 12 months even if he

returns to work after the five month waiting period but before 12 months from onset of the disability. Salamalekis v. Commissioner of Soc. Sec., 221 F.3d 828 (6th Cir. 2000); Newton v. Chater, 92 F.3d 688 (8th Cir. 1996); Walker v. Secretary of Health and Human Services, 943 F. 2d 1257 (10th Cir. 1991); McDonald v. Bowen, 818 F.2d 559 (7th Cir. 1986). There is no split in the circuits necessitating the guidance of this Court. On the issue of the availability of a trial work period under the facts of this case, five Courts of Appeals have ruled with one voice (and without one dissenting opinion) and no circuits have ruled otherwise. Only the Commissioner remains unconvinced by the rulings of these Courts of Appeals and numerous district courts which have repeatedly concluded that Social Security's policy is contrary to the unambiguous language of the statute governing entitlement to disability benefits and governing entitlement to a trial work period.

Having virtually no case law to support its position, the Commissioner relies instead upon a new regulation which is irrelevant to this action because it did not become effective until August 2000 and cannot be retroactively applied to this case, 65 Fed. Reg. 42,772 (2000), and upon dire and unsubstantiated statements regarding the supposed fiscal and programmatic impact the Fourth Circuit's ruling allegedly would have upon Social Security's operations. These arguments are without merit and are in any event inappropriate to the court's determination

regarding the proper construction of the statute governing entitlement to disability benefits and entitlement to a trial work period. The Fourth Circuit Court of Appeals properly construed that statute; consequently, its ruling, and the rulings of the four other courts of appeals, should be upheld by denying the Petition for a Writ of Certiorari.

I. The Fourth Circuit Properly Concluded that, According to the Plain Language of the Statute and Relevant Regulations, It is the Impairment, Not the Inability to Engage in SGA, Which Must Last 12 Months.

"Disability" is defined by the Social Security Act and regulations as the:

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. § 423 (d)(1)(A). As the Fourth Circuit concluded, it is evident from the plain language of the statute that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" refers to the impairment, not to the inability to engage in SGA. App. 8a. Social Security Ruling ("SSR") 82-52 and its successor 1995 Notice of Proposed Rulemaking, 60 Fed. Reg. 12166, upon which the Commissioner relies[1], however, construes the language to mean that "It is the inability to engage in SGA because of the impairment that must last the required 12-month period." SSR 82-52. Such a construction of the language is

absurd, leading, as it must, to the conclusion that the inability to engage in SGA can be expected to result in death.

The Fourth Circuit noted: "In addition to the facial clarity of the language, the grammatical structure and logic of the statute further compel the conclusion that the clause, 'which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months,' refers to the impairment, not to the inability to engage in SGA; the clause manifestly does not modify 'substantial gainful activity'." App. 7a-8a.

The fact that it is the impairment, not the inability to engage in SGA, which must last 12 months is supported by the language of other regulations which further define the disability statute.

> Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement.

20 CFR § 404.1509 (emphases added). This is quite explicit language, clearly linking the 12 month requirement to the impairment, not to the inability to engage in SGA. Equally compelling is the regulation regarding unrelated severe impairments:

> We cannot combine two or more unrelated severe impairments to meet the 12-month duration test. If you have a severe impairment(s)

[1] The Commissioner also relies heavily—and inappropriately—upon new final regulations found at 65 Fed. Reg. 42,772 (2000). These regulations became effective August 10, 2000, 65 Fed. Reg. 42772, and are inapplicable to this case.

> and then develop another unrelated severe impairment(s) but neither one is expected to last for 12 months, we cannot find you disabled, even though the two impairments in combination last for 12 months.

20 CFR § 404.1522(a). If it were the inability to engage in SGA which must last 12 months, then it would not matter whether two or more unrelated severe impairments were combined to meet the 12-month duration test. Instead, it is evident from the language of these regulations that the duration requirement is met if the impairment, not the inability to perform SGA, has lasted or is expected to last at least 12 months.

The regulation describing the purpose of the Listing of Impairments distinguishes between the severity of the impairment and the duration of the impairment:

> The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

20 CFR § 404.1525(a). This distinction between the severity and duration requirements is also reflected in 20 CFR § 404.1520, regarding the evaluation of disability in general, which states:

> Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled.

The distinction between the duration requirement and severity requirement is also consistent with the legislative history of the disability provisions. Considering the definition of "disability," which was first added to the Social Security Act in 1954[2], the Senate Committee on Finance stated that the determination of disability has two aspects: "(1) There must be a medically determinable impairment of serious proportions which is expected to be of long-continued and indefinite duration or to result in death, and (2) there must be a present inability to engage in substantial gainful work by reason of such impairment." Stone v. Heckler, 752 F.2d 1099, 1105 (5th Cir. 1985), quoting S. Rep. No. 1987, 83d Cong., 2d Sess. 21.

The Tenth Circuit in Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied 407 U.S. 911 (1972), and the Eighth Circuit in Titus v. Sullivan, 4 F.3d 590 (8th Cir. 1993), relied upon by the Commissioner in support of its position that the inability to engage in SGA and the impairment must both last 12 months, blurred the distinction between the duration requirement and the severity requirement. The Alexander court concluded that the "Inability to engage in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time." 451 F.2d at 1186. While the statute does require that the severity requirement (inability to engage in SGA) and the duration requirement exist at the same time, it does not require that

[2] The "long-continued and indefinite duration" language was changed to the current 12 month

they coexist for 12 months in order to qualify for benefits. In addition, the facts of Alexander and Titus suggest that no consideration was given to the availability of a trial work period, or to the expectancy language (See pages 24-26, infra) and the need to consider the entitlement criteria prospectively from the point of application and to award benefits—and a trial work period--from the first month all eligibility criteria are met (See pages 25, 27-28, infra).

Significantly, in more recent cases, the Tenth Circuit in Walker v. Secretary of Health & Human Services, 943 F.2d 1257 (10th Cir. 1991), and the Eighth Circuit in Newton v. Chater, 92 F.3d 688 (8th Cir. 1996), construed the language of the statute governing entitlement to disability benefits and the statute governing eligibility for a trial work period to conclude that benefits are payable and a trial work period is available if the impairment was expected to last at least 12 months, even if the return to work occurred within 12 months of onset. Although, in these two cases, the claimant's return to work actually occurred more than 12 months after onset, the Tenth and Eighth Circuits' construction of the entitlement and the trial work period statutes is in accordance with the Fourth Circuit's decision in this case, the Seventh Circuit's decision in McDonald v. Bowen, 818 F.2d 559 (7th Cir. 1986), the Sixth Circuit's decision in Salamalekis v. Commissioner of Soc. Sec., 221 F.3d 828 (6th Cir. 2000), and numerous district courts' rulings. In each of

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duration requirement in 1965.

these cases, benefits were payable and a trial work period was available despite the return to work within 12 months of onset. See pages 18-22 infra. Even if the impairment and the inability to engage in SGA must coexist for 12 months, the language of the entitlement statute requires that benefits be payable from the first month all criteria are met. A trial work period is also available from the very first month of eligibility. Therefore, if, at the time Walton returned to work, he had an impairment--and an inability to engage in SGA--which was expected to last 12 months, then he met all the criteria of entitlement and was entitled to disability benefits and to a trial work period.

The Fourth Circuit's holding that the 12 month duration requirement applies only to the impairment, in sharp contrast to the agency's position as reflected in SSR 82-52, properly construes the language of the statute and is consonant with the rulings of many courts before it. The Fifth Circuit in Singletary v. Bowen, 798 F.2d 818, 821 (5th Cir. 1986), concluded that the ALJ's determination that, because Singletary's condition had not prevented him from working for more than 12 continuous months, he was not entitled to disability benefits, "confuses the duration requirement, which applies only to the impairment, with the severity requirement, which determines whether the impairment prevents the claimant from working." After quoting the disability definition, the Court stated: "The statute quite clearly requires that it is the impairment only which must last for a

continuous period. Normally, of course, when a claimant has an impairment severe enough to prevent him from working, he will be unable to work for as long as the impairment lasts . . . . The statute, however, does not require that a claimant be unable to engage in work during the entire 12 month period." Id. at 821.

Other courts, construing the statutory language and the legislative history, have also held that the duration requirement applies, not to the inability to engage in SGA, but to the impairment itself. See, e.g., McDonald v. Bowen, 818 F.2d 559 (7th Cir. 1986); White v. Finch, 311 F.Supp. 307 (D. Mass. 1970)(holding that claimant was entitled to benefits because his impairment had lasted more than 12 months even though he had not been unable to work for 12 continuous months); Hunter v. Department of Health & Human Services, 851 F.Supp. 75 (E.D.N.Y. 1994); Jenkins v. Heckler, 783 F.Supp. 998 (D.S.C. 1992).

There is no doubt that Walton's impairment has lasted more than 12 months. The ALJ found, in his first decision, that Walton's impairment met the criteria of Listing 12.03, (App. 59a); and the ALJ concluded in his second hearing decision, more than two and one-half years after Walton's October 1994 onset date, that Walton continued to suffer with a Listing-level impairment, App. 45a. That fact is uncontested.

The Commissioner erroneously suggests that the Fourth Circuit's decision converts a long-term disability program into a short-term disability program in

contravention of Congressional intent. Petition 16. The two requirements that the impairment be expected to last 12 months and that it be of such severity at that time as to preclude SGA, in combination, eliminate short-term, transient disabilities. Some impairments, although of long-term duration—e.g. controlled hypertension—are never so severe as to prevent SGA and therefore do not meet the severity requirement, while other impairments, although of substantial severity at the outset, would never be expected to last 12 months and consequently do not meet the duration requirement. In either instance, the person would be denied disability benefits. In sharp contrast, Walton's schizophrenia is an impairment which satisfies both criteria: it is of such severity as to prevent SGA and it is of documented long-term duration.

The Commissioner also suggests that there is no plausible reason why Congress would have insisted that the impairment last 12 months, but not place a minimum duration requirement upon the inability to work. Petition 23. This argument is flawed for several reasons. First, there is a minimum requirement under Title II of a five month waiting period during which disability benefits are not payable and a trial work period is not available. In contradiction to the Commissioner's apparent suggestion that the five month waiting period should in effect be expanded to a 12 month waiting period before benefits are payable, Congress took action in 1972 to reduce the waiting period from six to five months.

The Commissioner's argument with regard to the Supplemental Security Insurance ("SSI") program is also without merit.[3] The SSI regulations quite clearly show that one can engage in SGA and still have a disabling impairment: "Under these rules an individual who works despite a disabling impairment may qualify for special SSI cash benefits . . . when his or her gross earned income exceeds the applicable dollar amount which ordinarily represents SGA . . . ." 20 CFR § 416.260, App. 102a. This regulation demonstrates that a disabling impairment and performance of SGA can coexist in a courageous and determined claimant, such as Cleveland Walton, who struggles against considerable odds to work despite continuing impairment.

These regulations and Congress' action to reduce the waiting period suggest the reason Congress did not insist that the inability to perform SGA last 12 months. Congress wanted to encourage disabled persons to try to work as soon as possible. The statute regarding the trial work period and the SSI regulations both reflect Congress' intention to encourage, not discourage, early returns to work. The

[3] Although Walton applied for both Title II and SSI disability benefits, the SSI portion has never been at issue in this appeal. Because Walton did not apply for SSI until April 1995, after the five month waiting period from his October 1994 onset date had elapsed, and because SSI benefits are not payable prior to the date of application, 20 CFR § 416.501, SSI benefits were never truly at issue. Walton's primary concern has always been his entitlement to Title II disability benefits and to a trial work period under Title II.

In any event, the Commissioner's argument regarding SSI benefits is misplaced. SSI claimants, like Title II claimants, must have an impairment which is expected to last 12 months or result in death (satisfying the duration requirement) and that impairment must be of such severity as to prevent SGA (satisfying the severity requirement).

Commissioner's long-standing policy, in sharp contrast, effectively penalizes those claimants, like Cleveland Walton, who persistently try to return to work despite continuing severe impairment. Social Security's policy essentially tells claimants to remain home at least 12 months before they try to work. By doing so, Social Security discourages good faith efforts to try to work and undermines initiative, in stark contrast to Congress' intent to encourage early returns to work, as expressed in the trial work period statute which makes a trial work period available from the very first month a person is entitled to benefits.

The Commissioner's complaints of the "profound programmatic and fiscal implications for the Social Security programs," Petition 17, are vague and unsubstantiated, of doubtful accuracy, and in any event misplaced in the judicial arena. There is no documentation whatsoever for the dire prediction that implementation of the Fourth Circuit decision would cost $9.8 billion over the next ten years in the Fourth Circuit alone. Petition 15, 18. This unsupported claim was never raised in the lower courts. Furthermore, these projected fiscal implications seem to be based upon a fundamentally flawed characterization of Walton's position. Walton has never suggested that he is entitled to an award of disability benefits for an indefinite period of time while engaged in SGA.[4] Rather, Walton is

[4] Walton was later approved for disability benefits based upon a second application and those benefits are continuing. Walton has been unable to perform any work since November 1999 due to his psychiatric impairment.

simply seeking the award of benefits during his trial work period[5] and three successive months and for any months, during the 36 month re-entitlement period, when he has been unable to engage in SGA. Moreover, even if these unsubstantiated figures are accurate, they are more appropriately presented in the legislative forum, not before this Court charged with the construction of the law. If proper construction of the law demands that benefits be paid, the judiciary may not refuse benefits on the basis of ill-defined fiscal constraints. Such considerations, if valid, must be addressed to the legislative branch, not the judiciary.

The Commissioner's argument regarding the increased administrative burden upon the agency from the "dramatic[] increase [in] the number of applications the agency must process" [Petition 18] if the Fourth Circuit's decision is implemented is also of doubtful validity. As a practical matter, claimants do not decide whether or not to apply for disability benefits based upon a court decision of which most claimants will be completely unaware. Further, it should not be Social Security's desire "to hide the ball" by discouraging disabled persons from applying simply because there will be an increased administrative burden on the agency.

[5] The regulations provide that after the trial work period has ended, the work done during the trial work period will be evaluated to determine whether the disability ended at any time after the trial work period. 20 CFR § 404.1592(a).

II. In Accordance With Four Other Courts of Appeals and Numerous District Courts, The Fourth Circuit Properly Found That Walton Was Entitled to a Trial Work Period.

A trial work period "is a period during which you may test your ability to work and still be considered disabled." 20 CFR § 404.1592(a). "A period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits[.]" 42 U.S.C. § 422(c)(3) (emphasis added). "The trial work period begins with the month in which you become entitled to disability insurance cash benefits. . . It cannot begin before the month in which you file your application for benefits . . . ." 20 CFR § 404.1592(e) (emphasis added).

The requirements for entitlement to disability benefits are set out in 42 U.S.C. § 423(a)(1):

> Every individual who—
> (A) is insured for disability insurance benefits. . .,
> (B) has not attained retirement age . . . ,
> (C) has filed an application for disability insurance benefits, and
> (D) is under a disability (as defined in subsection (d) of this section),
>
> shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits[.]

42 U.S.C. § 423(a)(1)(emphasis added); See also, 20 CFR § 404.315(a).

The statute and the regulations make clear that a claimant is "entitled" to disability benefits beginning with "the first month covered by your application in

which you meet all the other requirements for entitlement." 20 CFR § 404.316(a) (emphasis added). "Your period of disability begins on the day your disability begins if you are insured for disability on that day." 20 CFR § 404.321(a).

There is no requirement that a claimant wait 12 months prior to becoming 'entitled' to benefits. In fact, Congress did not intend such a delay in the award of benefits. Congress initially imposed a six month waiting period, but chose in 1972 to reduce the waiting period to five months, in apparent recognition of the financial hardship caused by the six month wait. "Reducing the waiting period from 6 months to 5 months would diminish the financial hardships faced by those workers who have little or no savings or other resources to fall back on during the early months of long-term total disability." H. Rep. No. 231, 92d Cong., 1st Sess. Congress obviously intended to get benefits to disabled applicants sooner rather than later and there was no intent to make applicants wait for 12 months to see whether they might recover from their impairment. "Congress could have easily required, as does S.S.R. 82-52, a waiting period of a year before awarding any benefits. But it is evident from an analysis of the statute that, as a matter of policy, it chose not to do so." Hunter, supra, 851 F.Supp. at 77.

Based upon the plain language of the statute and regulations, Walton was "entitled" to disability benefits, and consequently to a trial work period, beginning with the first month he met all the requirements. As of April 1995, prior to the

beginning of his attempt to work at Food Lion, Walton met all the requirements for entitlement status: he was insured; he had not reached retirement age; he had applied; and he had been disabled for five consecutive months. He had a disability as defined by 42 U.S.C. § 423 (d)(1)(A) because he had a severe mental impairment which was expected to last for a continuous period of at least 12 months.[6] Because Walton met all the criteria in April 1995, he was "entitled" to disability benefits beginning that month; and therefore, according to the plain language of the statute and supportive regulations, he was also entitled, at that time, to a trial work period.

The Fourth Circuit's construction of the statute and regulations is in accordance with the rulings of four other Courts of Appeals and numerous district courts throughout the nation which have held that a claimant is entitled to a trial work period if he has an impairment which has lasted, or is expected to last, at least 12 months even if he returns to work after the five month waiting period but before 12 months from onset of the disability. These Courts, consistent with the language of the statute and regulations, have focused quite properly on the five month waiting period because the statute and regulations require that benefits be

[6] A medical expert concluded prior to Walton's first hearing that Walton's impairment met the criteria of Listing 12.03 and that his impairments had lasted or could be expected to last at least 12 months. App. 56a-57a. The ALJ found that Walton's impairment did meet the criteria of Listing 12.03 and that his impairment "has precluded him from working for at least 12 continuous months." App. 59a.

paid in the first month all criteria are met, including passage of the waiting period, and they clearly state that a trial work period is available from the very first month in which a person becomes entitled to benefits.

The precedential case of McDonald v. Bowen, 818 F.2d 559, 564 (7th Cir. 1986), held that an "individual who suffers from an impairment that is expected to last at least twelve consecutive months is entitled to benefits (as well as to a trial work period) after completing the five-month waiting period." Even though the claimant had returned to work before the hearing and before 12 months had elapsed from the date of onset, the Court concluded that the Secretary was required to determine whether the claimant suffered from an impairment which was reasonably expected to last 12 months and whether the claimant had been disabled for five continuous months prior to her return to work; if so, then the Secretary was required to decide whether a nine-month trial work period covered her return to work and could not deny benefits to one enjoying a trial work period "on the basis that she had thereby demonstrated an ability to engage in substantial gainful activity." Id. at 565.

Likewise, the Tenth Circuit in Walker v. Secretary of Health & Human Services, 943 F.2d 1257 (10th Cir. 1991), concluded that an individual who suffers with an impairment which has lasted, or is expected to last, 12 months is entitled to disability benefits and to a trial work period after waiting five months. Similarly,

the Eighth Circuit in Newton v. Chater, 92 F.3d 688, 694 (8th Cir. 1996), rejected the rationale of SSR 82-52 and held:

> According to the statute and regulations, though, a trial work period starts in the month that entitlement to disability benefits begins, which is the month following five consecutive months of being under a disability that has lasted or is expected to last a total of twelve continuous months. . . In other words, under the statute, a claimant need not have had a disability for twelve consecutive months before he may test his ability to work.

Most recently, the Sixth Circuit in Salamalekis v. Commissioner of Social Security, 221 F.3d 828 (6th Cir. 2000), ruled that the claimant was entitled to disability benefits and to a trial work period despite his return to work within 12 months of his onset date. The Court noted that, pursuant to the plain language of the Act, a person can take advantage of a trial work period once he becomes entitled to disability benefits—that is, once he establishes the five prerequisites of entitlement: insured status, is under retirement age, has filed an application, the five month waiting period has expired, and is under a disability. The Court explicitly rejected the Commissioner's position that Salamalekis' return to work within 12 months of onset precluded a finding of disability:

> This position ignores the complete definition of disability under the Act, which covers not only those impairments that actually last 12 months, but also those impairments expected to last 12 months. At the time Salamalekis returned to work on March 2, 1992, his impairment was ongoing and was expected to last for 12 months, and the SSA so found. A claimant who meets Congress's prospective standard for disability cannot be denied benefits based on hindsight.

Id. at 832.

Repeatedly, district courts throughout the nation have adopted the rationale of the McDonald, Walker, Newton and Salamalekis courts, and their construction of the statute and regulations, to conclude that a claimant who has an impairment which has lasted, or is expected to last, at least 12 months is entitled to a trial work period, after the five month waiting period, even if he or she returns to work within 12 months of the onset date. See, e.g., Mulderig v. Sullivan, 1993 WL 22152 (S.D.N.Y. 1993)(return to work 11 months after onset date did not preclude entitlement to a trial work period and to disability benefits. "Therefore, if a claimant has filed an application, and has been disabled for five months from an impairment which is expected to last for at least twelve months, he is 'entitled' to benefits and, in turn, a trial work period."); Fabel v. Shalala, 891 F.Supp. 202 (D.N.J. 1995)(despite claimant's return to SGA eight months after her onset date, she was entitled to benefits and to a trial work period because she had met the four statutory requirements and was therefore "entitled" to benefits five months after the date her disability commenced, regardless of when SSA formally awarded benefits, and a person "entitled" to benefits may also engage in a trial work period); Hunter v. Department of Health & Human Services, 851 F.Supp. 75 (E.D.N.Y. 1994)(because there was the expectation that Hunter would remain disabled, she was entitled to disability benefits and to a trial work period even

though she returned to work within 12 months of her onset date); Wilson v. Shalala, 841 F.Supp. 1491(E.D. Wash. 1994)(despite claimant's return to work six months after onset, she was entitled to disability benefits, and therefore to a trial work period, once she had filed an application and been disabled for a period of five consecutive months); Tepfer v. Secretary of Health & Human Services, 712 F.Supp. 156 (W.D. Ark. 1989)(claimant who returned to work 11 months after onset was entitled to a trial work period unless, at the time of the return to work, her disability had not lasted, and could not have been expected to last, 12 months); Goldstein v. Harris, 517 F.Supp. 1314, 1316-17 (S.D.N.Y. 1981)(ALJ erred in concluding that claimant's return to work more than five months after onset precluded entitlement to disability benefits and eligibility for a trial work period. "Once a person becomes eligible for disability-insurance benefits—i.e., five months after the onset of the disability, 42 U.S.C. § 423—he may commence a trial work period."); Darring v. Callahan, 1997 U.S. Dist. LEXIS 15187, 15161 (S. Ala. 1997)(follows Seventh, Eighth and Tenth Circuit precedent to conclude that Commissioner had erred in failing to consider whether work performed within 12 months of onset date should be considered trial work if claimant suffered from an impairment which, as of the onset date, was reasonably expected to last at least 12 months and if claimant had been disabled five months prior to his return to work); Deihl v. Secretary of Health and Human Services, 835 F.Supp. 1182 (C.D. Cal.

1993) (concluding that claimant, whose impairment was expected to last more than 12 months, was entitled to a trial work period after the five month waiting period even though he had returned to work within 12 months of onset); Jenkins v. Heckler, 783 F.Supp. 998 (D.S.C. 1992).

In each[7] of these cases, the claimant had returned to work prior to final adjudication of their claim and within 12 months of their onset date. Each court interpreted the language of the statute and regulations regarding entitlement to benefits and to a trial work period to hold that a claimant is "entitled" to disability benefits—and therefore to a trial work period—in the first month he meets all the criteria, including passage of the five month waiting period, and therefore held that these claimants were entitled to a trial work period.

Likewise, in the case at bar, if, as the medical record clearly establishes, Walton had an impairment which was expected to last at least 12 months, then he was entitled to disability benefits beginning in April 1995, when his five month waiting period had elapsed. Consequently, his return to work in May 1995 must be considered as part of a trial work period and Social Security may not deny benefits to Walton on the basis that he had, by that work, demonstrated an ability to engage in SGA. McDonald, supra, 818 F.2d at 565 ("Absent any medical or other

[7] With the exception of Newton and Walker, where the return to SGA occurred more than 12 months after onset, in all the other cited cases the return to SGA occurred after the five month waiting period but within 12 months of the onset date.

evidence that demonstrates that plaintiff was able to engage in substantial gainful activity, the Secretary may not deny benefits to an individual enjoying a trial work period on the basis that she had thereby demonstrated an ability to engage in substantial gainful activity.").

In contrast to the Commissioner's position, the Fourth Circuit and other courts' conclusion is fully in accordance with the language of the statute and regulations and is consistent with the legislative history as well. Congress did not intend for claimants to wait 12 months to see whether their impairment would improve--or, under the Commissioner's interpretation of the disability definition--to see whether they would return to work, within 12 months. Congress did impose a waiting period during which no Title II disability benefits could be paid to accommodate its concern that persons with truly short-term impairments would not be paid disability benefits. Congress certainly could have imposed a 12 month waiting period, but it chose not to do so. In sharp contrast to Congress' 1972 action to reduce the waiting period, the Commissioner's interpretation would effectively increase the waiting period to 12 months.

To interpret the statute as the Commissioner does leads to a result which is either contrary to the language of the statute and regulations, or which is patently unfair and arbitrary on its face. The Commissioner suggests that the Agency could decide a claim within 12 months of the alleged onset and apply the "can be

expected to last at least 12 months" language to approve benefits. Petition 25. Applying the Commissioner's reasoning, a person could be approved for benefits prior to the end of the 12 months based upon an expectancy and still return to work within 12 months of onset. What then? Either the benefits, which had already been awarded, would be deemed overpayments and subject to recoupment, in clear contradiction to the expectancy language of the statute, or, if the beneficiary is allowed to retain those benefits, he is arbitrarily being treated in a more favorable manner than the claimant whose disability case is not finally adjudicated until more than 12 months after onset. Neither result is justifiable.

If the person who is paid benefits based upon the expectation that he would be unable to engage in SGA for more than 12 months but who then returns to SGA within 12 months of onset is forced to repay those benefits, then the Commissioner has effectively eliminated the "can be expected to last" provision out of the statute, because no one is entitled to keep benefits unless their disability has, in fact, lasted at least 12 months. Such an interpretation effectively changes the five month waiting period to a 12 month waiting period, in contradiction to the explicit language of the statute and regulations and in contradiction to the expressed intention of Congress.

The Sixth Circuit considered this problem in Sierakowski v. Weinberger, 504 F.2d 831 (6th Cir. 1974). In that case, the claimant had been approved for

disability benefits based upon the belief that his impairment was reasonably expected to last for more than 12 months. When he returned to work within 12 months of his onset date, the Appeals Council, on its own motion, concluded that he was never entitled to a period of disability because he had returned to work within 12 months of onset. The Sixth Circuit concluded that Sierakowski's return to work did not oblige him to repay the benefits he had received.

> The result reached by the Secretary and by the District Court is to read into the statute a provision for the conditional payment of benefits, repayable where the expected duration does not develop, unless excused under Section 404(b). We find nothing in the statutory language to support such a view, and much in the legislative history to refute it. The statute plainly says that it permits benefits where the inability "can be expected to last for a continuous period of not less than twelve months." We conclude that by the use of the cited language the Congress established a prospective standard whereas the Secretary urges one governed by hindsight.
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> . . .
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> We recognize that the construction urged by the Secretary results perhaps in more certainty and is thus easier of application, but this does not, in our view, justify a departure from Congressional intent. Furthermore, that construction tends to penalize good faith and diligence. It takes little imagination to conclude that a claimant less motivated than plaintiff here would be sorely tempted to sit out the full twelve months if he knew that the law imposed such a forfeiture for an earlier return to gainful activity.

Id. at 833-35.

Similarly, in Kendrick v. Califano, 460 F.Supp. 561 (E.D. Va. 1978), the Court declined to require the repayment of benefits received despite the claimant's return to work within 12 months of onset.

It is apparent . . . that the Secretary construed the Social Security Act as allowing benefits only when the claimant is in fact precluded from working for a continuous twelve-month period. Applying this interpretation, the Secretary denied benefits because plaintiff's disease has never forced him to refrain completely from work for a period of one year. The Court finds that this interpretation of the Act is erroneous in two respects.

First, the Act requires neither that the disability actually continue for 12 months nor that the claimant in fact be unable to work for 12 months. There are two steps to a finding of 'disability': first, a finding of a medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of at least 12 months; second, a finding that the impairment in fact causes an inability to engage in any substantial gainful activity . . . . The Act clearly allows benefits not only for those whose impairments last for a continuous 12-month period, but also for those whose impairments are expected to last for 12 months. The expectation, not the reality, of a 12-month impairment is sufficient.

. . .

> The significant point here is that a claimant whose disability was expected to last at least twelve months does not automatically lose entitlement to all benefits he received merely because he worked within the 12-month period.

Id. at 567 (citations omitted).

The Commissioner suggests that the Fourth Circuit's ruling regarding the availability of a trial work period is dependent upon its resolution of the duration requirement. Petition 23 and fn. 8, p. 23. The Court concluded that under the statute a trial work period "shall begin with the month in which [the claimant] becomes entitled to disability insurance benefits." App. 9a-10a. Because Walton met all requirements of entitlement as of April 1995, he was entitled to benefits

and to a trial work period. Id. The availability of a trial work period under the facts of this case is not dependent upon a finding that the 12 month duration requirement applies to the impairment, not the inability to engage in SGA. Rather, the expectancy language of the disability definition and the prospective perspective required by the entitlement statute, in combination, assure that a trial work period is available in this case even if the 12 month duration requirement applies to the inability to engage in SGA.

The language of the statute requires that a prospective perspective be used from the date of application to assess whether all five prerequisites are met. Congress dictates this result by stating that benefits must be payable from the first month that all requirements are met, including passage of the five month waiting period. The Court in Nappa v. Secretary of U. S. DHHS, 731 F.Supp. 579, 585 (E.D.N.Y. 1990), concluding that the claimant was not entitled to a trial work period because her work was performed prior to her application, recognized the prospective standard which Sierkowski and McDonald applied. "Although the requirement of a twelve month continuous disability is 'forward-looking and is not to be nullified by hindsight,' it is evident that it is forward-looking from the point an application is filed." Id. (emphasis added). Likewise, the Sixth Circuit in Salamalekis applied a prospective standard for assessing disability which could not be reversed in hindsight. Salamalekis, supra, 221 F.3d at 832.

At the point Walton filed his application, he had an impairment—and an inability to engage in SGA--which was expected to last 12 months and therefore he was entitled to disability benefits and to a trial work period once his five month waiting period passed. To consider the requirements in hindsight after the 12 months have elapsed is contrary to the statute and regulations because it fails to award benefits in the first month in which all the statutory requirements are satisfied and in each successive month thereafter. Moreover, it reads into the statute a 12 month waiting period, which Congress did not impose and did not intend.

Even if the Commissioner's interpretation allows a claimant already approved for benefits to retain those benefits if he returns to work within 12 months of onset, that result would be unfair and arbitrary with respect to those claimants, like Walton, whose disability is not finally adjudicated within 12 months of onset. They are treated differently for the sole reason that Social Security did not adjudicate their case in a timely manner. As the Fourth Circuit noted, neither § 423 (a)(1) nor § 423(d) mentions adjudication as a prerequisite to disability or entitlement to disability benefits. App. 13a. Similarly, the Sixth Circuit in Salamalekis refused to make the award of benefits, a factor dependent upon the agency's conduct, an additional prerequisite to trial work eligibility, finding such a prerequisite to be contrary to Congress' unambiguous intent. 221

F.3d at 833-4. The Hunter Court also recognized the inequity of making an award of benefits or a trial work period contingent upon agency action: "The point at which the Secretary comes to acknowledge the existence of a disability is not and should not be a consequential factor in the calculus of entitlement, let alone a determinative one." Hunter, supra, 851 F.Supp. at 77.

Finding that a trial work period is available despite a return to work within 12 months of onset is not, as the Commissioner suggests (Petition 23, fn 8), in conflict with the holding of Cieutat v. Bowen, 824 F.2d 348 (5th Cir. 1987). That case held only that a trial work period cannot begin prior to filing an application for benefits. Id. at 359. Walton's trial work period did not begin until after his application for benefits and therefore his position in no way conflicts with the Cieutat holding.

Because the Commissioner's interpretation of the statute and regulations is inconsistent with the plain language of the Act, this Court should not defer to the Agency's interpretation. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778, 2781 (1984). The Fourth Circuit in its decision recognized Chevron deference where it is due, but concluded that in this case no deference was due: "In the first place, agency interpretation of the Act is

not appropriate because the language of the statute is clear and unambiguous. Moreover, even if interpretation were required, the Commissioner's interpretation—which assumes either a duration period or adjudication requirement and does violence to the grammatical structure of the statute—conflicts with the very statute it purports to elucidate. We are bound to reject such constructions." App. 6a-7a. Similarly, the Sixth Circuit in Salamalekis concluded that no deference was due: "Here, however, no deference is due because we find SSR 82-52, and the agency's position in this case, to contradict the plain language of the governing statute, 42 U.S.C. § 422 (c)." 221 F.3d at 832.

The lengthy list of cases rejecting SSR 82-52[8] demonstrates that the courts, while explicitly recognizing the deference due the Agency, have repeatedly concluded that no deference was due in this instance because the Agency's position is contrary to the express language of the statute and regulations. The Newton court certainly recognized the deference often due an agency's interpretation of its own regulations but nevertheless rejected the Agency policy of SSR 82-52. "While courts must give deference to an agency's interpretation of its

[8] The Agency's March 6, 1995 Notice of Proposed Rulemaking ("NPRM") is merely a restatement of the policy of SSR 82-52. "These revisions . . . do not represent a change in policy . . . ." 60 Fed. Reg. 12166, 12168 (March 6, 1995). There is nothing in the NPRM to suggest that those courts which rejected the policy of SSR 82-52 would rule any differently when considering the very same policy as explained anew in the NPRM. Both the Fourth Circuit in this case and the Salamalekis court considered the NPRM and still rejected the agency policy reflected therein.

own regulations, courts are not bound by them and they are not conclusive . . . . The agency ruling, SSR 82-52, is inconsistent with the statutory provision governing the start of the trial work period." Newton, supra, 92 F.3d at 693-4. Likewise, the court concluded in Hunter, supra, 851 F.Supp. at 77, that "On its face, S.S.R. 82-52 contradicts the plain language of the Social Security Act's definition of 'disability.' More importantly, S.S.R. 82-52 undercuts, if it does not nullify, the Act's 'trial work period' policy, which seeks to encourage the disabled to return to work as soon as possible . . . ." Similarly, the Fabel court recognized the level of deference due the Agency's interpretation of the statute but nonetheless concluded: "Despite this level of deference, the Court finds the SSR 82-52 is plainly erroneous and inconsistent with the Act." Fabel, supra, 891 F.Supp. at 206. The Tenth Circuit in Walker, supra, 943 F.2d at 1260, also recognized the deference due the Agency but nonetheless rejected its policy and its failure to apply the ruling of McDonald nationwide: "In our view, the Social Security Administration's rejection of the Seventh Circuit's position in McDonald is inconsistent with the language of the Act and, therefore, Acquiescence Ruling 88-3(7) is entitled to no deference."

CONCLUSION

The Petition for a Writ of Certiorari should be denied. In marked contrast to the circumstances under which this Court granted certiorari in Bowen v. Yuckert, 482 U.S. 137 (1987), there is no difference of opinion among the courts of appeals regarding entitlement to a trial work period under the facts of this case. In Yuckert, nearly all of the circuits had considered the validity of the severity regulation and the courts of appeals had split nearly evenly on the question of the regulation's validity. Id. at 145, fn 4, 155 fn 1, 2. In the instant case, however, five courts of appeals have considered the question of when a trial work period is available and five courts of appeals have ruled consistently and without variation or even a dissenting opinion, all concluding that a trial work period is available to a claimant with a severe impairment which has lasted or is expected to last 12 months, even if the claimant returns to substantial gainful activity within 12 months of onset. Because there is no conflict among the circuits, there is no need for this Court's guidance on this issue and therefore no need for this Court to grant certiorari.

The fact that the Commissioner's policy is of longstanding duration provides no compelling reason to accept this case for review. During the several decades that Social Security has implemented this policy, it has been repeatedly advised by court after court (See pages 18-22, infra) that its' policy was contrary to the

explicit language of the statutes governing entitlement to benefits and governing entitlement to a trial work period. The fact that the Commissioner has chosen to ignore scores of court rulings throughout the nation and has chosen to continue to implement its flawed policy outside the Seventh, Tenth, Eighth, and Sixth Circuits only underscores the need for finality here. By refusing to grant a writ of certiorari in this case, this Court could send a message to Social Security that the decisions of those circuits must stand and that the decision of the Fourth Circuit Court of Appeals must be applied throughout the circuit. Denial of this certiorari petition will also allow Cleveland Walton to finally reach some closure on this case which has been ongoing in one forum or another for more than six years.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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